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IN THE

Supreme Court of the United States

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October Term, 1968

No. 1282

STANLEY DUANE BURDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

VIRGIL V. BECKER, ESQ.,
690 East Green Street,
Pasadena, California,
Counsel for Petitioner,
Stanley Duane Burden.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Stanley Duane Burden, by his counsel, Virgil V. Becker, Esq., respectfully petitions for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit entitled Stanley Duane Burden v. United States of America, file No. 21867 the affirmation of conviction in the United States Ninth Circuit Court of Appeals on February 14, 1968. A copy of the opinion of the Circuit Judges in the United States Court of Appeals for the Ninth Circuit is appended to this petition as provided under Rule 23-(1)(i).

Jurisdiction is invoked for this Petition for Writ of Certiorari under the provision of Title 28 United States Code, Section 1254(1)(2).

The petition for Writ of Certiorari is based upon the stated grounds below in that it has been claimed there was insufficient evidence to permit the District Court Judge to convict the defendant under the charges stated in the indictment and also on the grounds that the defendant was the victim of an entrapment and further upon the constitutional grounds that the present rulings of the Circuit Court of Appeals and interpretation of the law involved is in violation of the defendant's Constitutional rights against self-incrimination and other constitutional guarantees of which he has been deprived in the aforesaid prosecution.

On the 28th of September 1965 the defendant, Stanley Duane Burden, was found guilty of Counts 1 and 2 of the indictment, said Judgment was filed on September 28, 1965. The defendant, Stanley Duane Burden filed an appeal with the United States Court of Appeals for the Ninth Circuit and the aforesaid judgment was filed on February 14, 1968.

The defendant made a motion for a new trial before the trial court on September 29, 1965 said motion was denied.

A petition was made to the Supreme Court of the United States for an order extending time to file petition for Writ of Certiorari and that order was granted extending the time to and including April 1 of 1968 on an order dated by the Honorable Justice W. O. Douglas on the 18th day of March 1968.

The statutory provision providing for the petition for Writ of Certiorari is contained in Title 28 United States Code Section 1254(1)(2).

The questions presented for review include:

A.

The Defendant Was a Victim of Entrapment.

The sufficiency of the evidence to convict the defendant, petitioner herein, of violation of the provisions of law contained in Title 12 United States Code, section 174 (related to both counts 1 and 2 of the original indictment) and more particularly this is directed to the provisions requiring that a narcotic drug

> "which, as the defendant then and there well knew, previously had been imported into the United States of America contrary to United States Code, Title 21, section 173."

No evidence was introduced whatsoever indicating the petitioner herein went anywhere other than Pasadena, California to obtain the narcotics involved and there is no evidence indicating that the defendant had any knowledge whatsoever or could have had any knowledge whatsoever of the source of the heroin whether it was obtained from sources, illegal or legal, within the United States or in the State of California or the backyard of the pleasant little home in Pasadena, California from which it was delivered to the petitioner. The trial court and other decisions in various circuits of the United States differ in opinion and require an adjudication by the Supreme Court of the United States to make a determination of whether or not the trial court or the Circuit Court of Appeals for the Ninth Circuit may be permitted to indulge in promoting the fiction in requiring the defendant in such a criminal action brought under Section 174 to be convicted inferring by non-statutory inferences knowledge which is thrown into the defendant's lap thus requiring his testimony when

in fact the constitutional privilege against self-incrimination should protect the defendant from such burden. In any event the defendant did testify in the case at bar and no testimony is provided indicating that the defendant had any knowledge whatsoever that the narcotic involved was unlawfully imported into the United States contrary to the provisions of law as alleged.

Furthermore the defendant was convicted upon facts which indicate to the petitioner an entrapment. The petitioner was contacted by a friend he had known for some period of time who had wanted to purchase some narcotics and with whom he had shared some narcotics by their mutual consent on previous occasions and who had never procured narcotics for "sale" through the petitioner previously. The only narcotics used was for their own mutual personal use. This friend had been arrested for a nacrotic offense and was being used as an informer-agent of the narcotics officers in conducting the investigation that lead to the petitioner's arrest. The petitioner has urged previously and has urged again here that the defendant in the trial court, petitioner herein, was the procuring agent of the informant and as such could not be guilty of selling or facilitating the sale or transportation as charged since the informant was the agent of the government and his possession of the heroin was not criminal for that reason the defendant's possession should not be punishable under the provisions of the statute as charged in the indictment. Furthermore the defendant was the victim of entrapment by the government through the informant and his conduct.

It is contended that the provisions of the statute involved herein, Title 21 United States Code Section 174,

is unconstitutional in that it violates the provisions of the Fifth Amendment to the United States Constitution.

The provisions of Title 21 United States Code Section 174 are as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.00 For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954). the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.00.
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The provision the statute places on the defendant to explain his possession of the narcotic involved at the trial court throws the burden of proof thereon on the defendant and is contrary to the provisions of the Fifth

Amendment to the United States Constitution which reads:

> ". . . nor shall be compelled in any criminal case to be a witness against himself, . . ."

Facts produced at the trial indicate that the witness Marmolejo, hereinafter referred to as the informant, called the petitioner Burden, hereinafter referred to as petitioner, on January 25, and told him that he was interested in *purchasing* a quarter or a half ounce of heroin "and if he could make a buy for me" [Rep. Tr. p. 6, lines 5-9]. The informant had first met petitioner in April of 1964 [Rep. Tr. p. 17, line 9]. The two (informant and petitioner) used narcotics together [Rep. Tr. pp. 17 and 18]. And the two had purchased narcotics together previously [Rep. Tr. pp. 21 and 22].

Then in explanation the informant testified: "No—I guess I called him and told him if he could score a quarter for me." [Rep. Tr. p. 6, lines 19-20; p. 23, lines 6-25]. We had fixed together—Never a *sale* [Rep. Tr. p. 20, line 9].

The petitioner called the informant back after about five minutes and told the informant that the petitioner had called his connection and that the buy could be made and the two men arranged to meet at petitioner's home at 8:00 [Rep. Tr. p. 7, lines 6-17].

The informant called the government agents and they rendevouzed and proceeded to meet the petitioner at his house [Rep. Tr. p. 8, lines 6-22].

Prior to the informant calling the petitioner in this action the informant had been arrested by agents of the Narcotic Bureau and his case had been dismissed [Rep. Tr. p. 24, lines 4-12].

After the informant and the narcotic agent met with the petitioner the three proceeded to a house near the intersection of Raymond and Summit in Pasadena [Rep. Tr. p. 9, lines 6-14]. The petitioner pointed out his connection's home [Jay-Jay was the connection see Rep. Tr. pp. 35-36] and recognized the connection's car in the driveway [Rep. Tr. p. 26, lines 8-15].

At the time they arrived at the connection's home the informant produced forty dollars, supplied previously to him by the narcotic agent [Rep. Tr. p. 34] and the informant together with the agent gave the petitioner $120.00 [the going price for a half ounce of heroin, see Rep. Tr. p. 28, lines 14-25] and the petitioner walked around the block [Rep. Tr. p. 10, lines 19-23]. When the petitioner returned in about ten minutes [Rep. Tr. p. 10, line 24] with a quarter of heroin in two condoms one was handed to the informant who gave it to the narcotic agent [Rep. Tr. p. 11, lines 1-4, p. 12, lines 1-7].

The three men returned to petitioner's residence and the petitioner "fixed" while the Narcotics Agent went to the bathroom; [Rep. Tr. p. 13] then the informant and the narcotic agent left the house [Rep. Tr. p. 14].

The informant had testified that he had bought heroin *with* the petitioner three times in the past for his own use [Rep. Tr. p. 14, lines 24-25; p. 15, line 1].

While testimony indicated the narcotic agent at least testified that the petitioner gave him a card when he asked how he could get in touch with the petitioner to buy more heroin [Rep. Tr. p. 39, lines 21-25; see also Pltf. Ex. 1] the narcotics agent testified that after January 25th he called the petitioner three or four times to attempt to purchase narcotics, however his at-

tempts were unsuccessful [Rep. Tr. p. 52]. While the narcotic agent attempts to show by his self-serving testimony that the petitioner thought that the informant or the Agent was working with the police as a reason for not giving further cooperation in assisting the agent in purchasing more narcotics [Rep. Tr. p. 52, lines 16-19] the cross-examination of this agent shows that the agent's speculation of the informant being thought of as an informer was not recorded in his reports which indicated "several" additional unsuccessful attempts to obtain the petitioners cooperation in procurement of narcotics even through the following April [Rep. Tr. pp. 53, 54, 60, 61, 62 and 63].

Referring to the question of importation the narcotic agent testified that to his knowledge from a couple of hundred cases that he had worked on "heroin is not *grown* in this country" [Rep. Tr. p. 44, lines 16-23]. The Reporter's Transcript at page 44, lines 1 through 2 appears to show that the United States Attorney was going to show that it was not unusual for people to grow heroin in this country.

There was absolutely no testimony whatsoever that there was any thought or knowledge on the part of the petitioner that the heroin obtained was obtained anywhere except from the connection at Pasadena, California. There is no testimony that the heroin was not obtained from poppy seeds grown at the residence in Pasadena, California or for that matter any other place in the United States.

It is important for the court to consider the narcotic agent's testimony that it was his understanding that the defendant was going to buy heroin to deliver to him [Rep. Tr. p. 51, lines 3-15].

With respect to the division in Title 21 U.S. Code, Section 174, the court pointed out that in the matter entitled *Chavez v. United States* cited at 343 F. 2d 85, 86;

"In order to convict Chavez of a violation—"

At the conclusion of the *Chavez* case the court said further:

> "If the defendant so testifies (that he does not have such knowledge that the narcotics were illegally imported in the United States), and is believed by the jury, then the government has failed to prove an essential element of the offense and the jury should acquit. The essential elements were written into the statutes by congress. The courts have no warrant to read one of those elements out of the statutes because of a feeling that it is too difficult of proof, or that the presumption establishing the element prima facie is too easy to rebut."

In the instant case the narcotics agent has testified that from his experience he had not known heroin to be "grown" in this country [Rep. Tr. p. 44, lines 16-23].

It is common knowledge I am sure, and such common knowledge can be illuminated through a reference to a book entitled "A Manual of Pharmacology and Its Applications to Therapeutics and Toxicology" by Torald Sollmann, M.D., Seventh Edition, published by W. B. Saunders Company in Philadelphia and London in 1948 at page 228:

> "Morphine and the related alkaloids of opium (the coagulated juice of the incised seed capsules of the opium poppy). . ."

continuing on the same page the text reads:

"The opium poppy is cultivated in Asia and Egypt; it can be raised in the United States . . ."

Thus it can be seen by this reference that poppy seeds are the things that are grown not heroin—and they can be grown in the United States. The only testimony in the instant matter before the bar was from the agent as represented above which does not in any way show directly or indirectly that the heroin was in fact illegally *imported* into the United States contrary to law.

Furthermore it is strenuously stressed that there is no testimony showing that the petitioner herein knew the same, referring to the heroin, to have been imported in or brought in to the United States contrary to law.

While the Court may indulge in the fiction that would impose on the defendant a legal inference such as a statute may purport to confer there is no statutory inference that heroin is imported in the United States and there is no statutory inference that the defendant knew it was illegally brought into the United States simply because it was heroin. These are items of proof to which the United States Government must fulfill its obligation in offer of proof if its going to choose Section 174 to prosecute a defendant for the acts for which this petitioner was charged.

The provision of Section 174 requiring the defendant to testify that is where it reads "unless the defendant explains the possession to the satisfaction of the jury" is directly contrary to the provisions of the Fifth Amendment of the United States Constitution where it is provided that: "nor shall be compelled in any crimi-

nal case to be a witness against himself.". Section 174 as it is used here attempts to do indirectly what the constitution prohibits and which cannot be done directly. It thus, in the eyes of the petitioner herein, renders this provision of Section 174 unconstitutional for those reasons. Such provision is as venomously objectionable as were the attempts by the Government to impose criminal liability through requirement of self incrimination by requiring taxes and tax reports to be made of gamblers.

As was set forth in the matter entitled *Chavez v. The United States,* 343 F. 2d 85 (Ninth Circuit 1965) at page 86 the Court observed:

> "In order to convict Chavez of a violation of section 174 on either of these counts the Government needed to prove three ultimate facts: (1) that at Sacramento, on or about July 31, 1963, Chavez sold or concealed, or facilitated the sale, concealment or transportation of, the described quantity of heroin; (2) that the heroin had been imported contrary to law; and (3) that Chavez knew the heroin had been imported unlawfully. See Harris v. United States, 359 U.S. 19, 23, 79 S.Ct. 560, 3 L.Ed.2d 597; Brothers v. United States, 9 Cir., 328 F. 2d 151, 152-153."

In the *Chavez* matter the Court, at page 88, observes:

> "In Bradford, as in the Hernandez and Rosenberg cases, the issue was not specifically before the court. But it was definitely in issue in Griego v. United States, 10 Cir., 298 F. 2d 845, 848-849; United States v. Feinberg, 7 Cir., 123 F.2d 425, 427; and United States v. Turner, 2 Cir., 65 F.2d 587, 588. In each of those cases it was held that

testimony by the defendant that he did not know the drugs were illegally imported, if believed, may be accepted by the jury as rebutting the presumption, arising from a finding of possession, that he had such knowledge."

While the *Chavez* case deals at length on pages 88 and 89 with the questions of knowledge of the illegal importation it must be borne in mind that if this Section 174 is read in context with the common practice of bringing into the country drugs and narcotics contrary to the law by such illegal importation then such section makes good sense. However by applying such section to mere possession or obtaining possession of narcotics in the United States without any contact whatsoever with the borders directly or indirectly such prosecution under Section 174 is not appropriate at all particularly where the Government fails to carry the burden of proof to show the illegal importation or the knowledge thereof.

Addiction to the use of narcotics was at one time used as a basis of conviction of the hapless victims for imprisonment. The more enlightened courts have removed this as a criminal offense.

Possession of narcotics without prescription or other lawful use is the subject of prosecution in the control of narcotics in California State Courts. But under Section 174 Congress stepped in further with the requirement that for conviction the person in possession must have narcotics (1) that were in fact illegally IMPORTED into the United States; and (2) that the person in possession must have KNOWN that they were illegally imported into the United States.

The conviction of petitioner in the case at bar was based on NO evidence that the narcotics were (1) illegally *imported;* and on NO evidence (2) the defendant KNEW the narcotics were illegally imported.

B.

A Procuring Agent for the Government Buyer Is Neither the Seller nor the Facilitator of a Sale.

> "A participant in a particular transaction must be punished either as a seller or as a buyer. There is no general offense of participation in the transaction viewed as a whole."
>
> *United States v. Moses,* 220 F. 2d 166, 168.
>
> "One who is a procuring agent for the buyer is, under the law, neither the seller nor the facilitator of the sale."
>
> *United States v. Prince,* 264 F. 2d 850, 858.
>
> "There the Court treated as decisive the lack of any community of scheme between the defendant and the principal wrongdoers."
>
> *Marci v. U.S.,* 127 F. 2d 827.

In cases like the present one, the admitted fact that public officers proposed and solicited the criminal act is not offset by an indication that the person solicited had recently engaged in similar criminality. While other facts may prevent such a situation from amounting to entrapment as a matter of law, cases like this will almost always present a substantial question of fact on the entrapment issue which must be considered and resolved like any other question of fact.

See, *Henderson v. U.S.,* 261 F. 2d 909;
Adams v. U.S., 220 F. 2d 297;
United States v. Sawyer, 210 F. 2d 169.

In addition to the grounds above discussed, the defendant urges this Court that the evidence clearly established his entrapment by Marmolejo, the agent of Treasury Agent Borquez.

Quoting from *Henderson v. U.S.*, 261 F. 2d 909 at 912, that Court said,

> "As the Supreme Court did in the Sherman case, 'we conclude from the evidence that entrapment was established as matter of law.' As it was in that case, 'it is patently clear' on the evidence that the victim of the informer's activities *'was induced* by' *him.* The fact that, in this case, the defendant took the stand and by her own testimony disclosed the circumstances of the entrapping and the informer was not called by the Government to dispute or deny the defendant's testimony, does not, we think, make this a different case. Here, outside of an agent's unresponsive and inadmissible conclusion in answer to a question on cross-examination, the only evidence that she was or had been connected with narcotics violations was, as in Sherman's case, that she had been convicted in 1952, five or more years ago, and had served a term therefor. As in that case, no narcotics were found on the defendant or in her premises, and there is positive and uncontradicted evidence that she made no profit on the transaction.
>
> (2) We are also of the opinion on the record as it now stands, that for the reason stated in U. S. vs. Sawyer, 3 Cir., 210 F. 2d 169 and Adams vs. U. S., 5 Cir., 220 F. 297, the defendant acted, not for herself, but as the sub-agent of, and conduit for, the Government's provocator, and be-

cause, acting for the Government, he was not guilty of any offense, neither was she". (emphasis ours)

In *Sherman v. U.S.*, 356 U.S. 369 at 372, the following is found:

"In Sorrells vs. U.S., 287 U.S. 435, this Court firmly recognized the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in arsenal of the police officer. However, 'a different question is presented when the criminal design originated with the officials of the Government; and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.' 287 U.S., at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations".

Reading on Page 376, the Court continued,

"The Government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the Government agent. The set-up is accepted by the agent without even a question

as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted."

Wherefore, your petitioner prays, by and through his counsel, that a Writ of Certiorari issue under the Seal of this Court, directed to the Honorable Justices of the Supreme Court of the United States and to the Circuit Court of Appeals for the Ninth Circuit and to the District Court, Central Division, for the Southern District of California, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States of America; and that the judgment herein of the Court of Appeals for the Ninth Circuit; and that of the trial court, be reversed by this court, and for such other and further relief as to this Court may seem just and proper within the premises.

Dated on this 27th day of March, 1968.

Respectfully submitted,

VIRGIL V. BECKER, ESQ.,
Counsel for Petitioner.

APPENDIX

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Stanley Duane Burden, Appellant, vs. United States of America, Appellee. No. 21,867.

[February 14, 1968]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Hamley and Koelsch, Circuit Judges

PER CURIAM:

This is an appeal from a court conviction of the possession and sale of heroin, or the facilitation of each.

An examination of the briefs filed on this appeal, and the essential portions of the record before us, clearly indicate there is no substance in either of appellant's claimed errors; *i.e.*, that there was insufficient evidence to permit the district court judge to convict the defendant; and to rule that there was no entrapment.

The court stated the facts that established a lack of entrapment (Tr. 177). The "buying agent" theory advanced by appellant does not consider the holding of this court in *Vasquez v. United States,* 290 F.2d 897 (9th Cir. 1961) and *Bruno v. United States,* 259 F.2d 8 (9th Cir. 1958).

Finding no error, we AFFIRM.